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UNITED ASIAN BANK BHD.

v.

TUNKU ABDULLAH IBNI ALMARHUM TUNKU ABDUL RAHMAN

b

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

[CIVIL SUIT NO. D3-23-1754-87]

10 APRIL 1989

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CONTRACT: *Guarantee - Impairment of assets of principal borrower - Whether guarantor discharged from liability - Allegation of negligence of receiver to realise assets of principal borrower - Guarantors knowledge of breach of obligations by principal borrower - Whether guarantor can rely on breach by principal borrower to escape liability under guarantee.*

This was an appeal against an O. 14 judgment. The defendant, who sued as a guarantor raised two issues i.e.,

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i) that he was discharged from liability as there was impairment of assets of the principal borrower and,

ii) that the receivers appointed by the plaintiff to realise the assets of the principal borrower were negligent.

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The principal borrowers executed two debentures, one in favour of the plaintiff and subsequently another in favour of "KYBB". Receivers were appointed under both debentures. However, the plaintiff failed to register the debenture and lost priority as creditors to "KYBB". The creation of the second debenture was in breach of cl. 9 of the first debenture. The defendant, as chairman of the principal borrower was held to have been fully aware of the creation of the second debenture. The defendant sought to rely on this breach under the first debenture to escape liability under the guarantee.

*f***Held:**

[1] The guarantors liability is largely based on the terms and conditions and provisions of the guarantee and his liability thereunder is in no way limited or released to anything done or not done to any other security that had been provided by the principal borrower to the plaintiff.

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[2] The defendant, being aware of a breach under the first debenture by the principal borrower, cannot rely on such breach as a means of escaping liability under the guarantee which is a distinct and separate security altogether and for which he is personally liable.

[3] The inability of the receiver appointed by the plaintiff to realise the assets of the principal borrower was because they lost, their priority as creditors and s. 92, 94 Contracts Act 1950 has no relevance at all to the facts of this case.

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[4] The affidavit showed that the assets of the principal borrower were intact and there was therefore no question of impairment of assets.

[Appeal dismissed costs to be taxed on solicitor/client basis pursuant to the guarantee.]

Legislation referred to:

Contracts Act 1950, ss. 92, 94

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For the appellant - B.L. Teo; M/s. Vincent Lim & Teoh

For the respondent - Cumaraswamy; M/s. Ng Ek Teong & Partners

JUDGMENT

Siti Norma Yaakob J:

In this appeal against an O. 14 judgment, the defendant, who is sued as a guarantor raised the following 2 issues.

1. There has been impairment of the assets of the principal borrowed as to discharge his liability under the guarantee.
2. There has been negligence on the part of the receiver appointed by the plaintiff to realise the assets of the principal borrower.

Apart from the guarantee dated 13 July 1977, the principal borrower, Shahalah Sdn. Bhd., of which the defendant was its chairman, had also executed a debenture dated 20 June 1977, in favour of the plaintiff.

The principal borrower has been placed under receivership under the debenture with the appointment of a receiver and manager on 17 December 1979, but as the plaintiff had failed to register the debenture, they lost their priority as creditors to Kwong Yik Bank Berhad, in whose favour the principal borrower had created a subsequent second debenture on 24 March 1978, and under which a second set of receivers and managers were appointed on 14 November 1979. It is not disputed that under cl. 9 of the first debenture created in favour of the plaintiff, the principal borrower had agreed not to charge their properties further without the written consent of the plaintiff. In total disregard of this clause, the principal borrower had created the second charge in favour of Kwong Yik Bank.

The matter of priority was the subject of a suit between the two banks (OSC 98/80) and at the hearing, it was decided that the plaintiff had priority over Kwong Yik Bank. On appeal to the Supreme Court, a consent order was made, whereby both parties, *inter alia*, agreed to have the matter retried before another Judge of the High Court. However, up to this day, the matter of priority has not been resolved as the plaintiff had not taken any steps to enforce the Supreme Court consent order. The defendant has also complained that it took the plaintiff 3 years to extract the order itself.

I do not consider that the matter of priority can be made an issue in this case as the defendant is sued for his liability under the guarantee he had executed in favour of the plaintiff. Moreover, as the chairman of the principal borrower, the defendant must have been fully aware that the creation of the second debenture in favour of Kwong Yik Bank, without the written consent of the plaintiff was a breach of an obligations agreed to by the principal borrower and this breach cannot now be used by the defendant as a means of escaping his liability under the guarantee, which is a separate and distinct security altogether and for which the defendant has held himself out to be personally liable.

As a consequence of the non-registration of the first debenture, the receiver and manager appointed by the plaintiff on 17 December 1979, never had possession nor control of the assets of the principal borrower. The control and management of the assets of the principal borrower had always been with the receivers and managers appointed by Kwong Yik Bank on 14 November 1979 under the second debenture.

As such any allegations by the defendant that the plaintiff or the receiver appointed by them had failed to realise the assets of the principal borrower so as to reduce his liability under the guarantee have no basis whatsoever as neither the plaintiff nor their receiver had any chance to get in on the assets by reason of priority. The defendant is fully aware of

a this and for that very reason, reliance on ss. 92 and 94 of the Contracts Act 1950, has no relevance at all to the facts of this case. In any event the affidavit evidence shows that all the assets of the principal borrower are still intact, as the receivers and managers appointed by Kwong Yik Bank have not realised such assets.

b As a guarantor, the defendant's liability is largely based on the terms and provisions of the guarantee that he had executed and from my perusal of such terms in the guarantee, the defendant's liability is no way limited or released to anything done or not done to any other security that had been provided by the principal borrower to the plaintiff.

On that finding, I had accordingly dismissed the defendant's appeal with costs to be taxed on a solicitor and client basis pursuant to the guarantee.

c Also found at [1989] 2 CLJ 1095

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